UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

IN RE CHARGE OF KATALIN BALAZS-KILGORE	)	
UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding Case No. 93B00109
AUBURN UNIVERSITY, Respondent.	)	

ORDER ON MOTION TO DISMISS AND
FIRST PREHEARING CONFERENCE REPORT AND ORDER
(September 23, 1993)

I. *Procedural Matters*

A. The first telephonic prehearing conference was held on September 21, 1993 at 10:00 a.m., as scheduled by the order issued August 17, 1993.

B. Appearances were entered as follows:

Rose A. Briceno, Esq., and
Anita Stevens, Esq., for Complainant
David C. Whitlock, Esq., for Respondent

C. The parties appearing not to have explored an agreed disposition, are encouraged to do so.

II. *Motion to Dismiss*

In this case, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), on behalf of Katalan Balazs-Kilgore, the charging party, alleges that she was unlawfully denied a position by Auburn University (Respondent or Auburn) in its mathematics departments for which she applied in November 1991.

OSC alleges that Auburn instead preferred to hire foreign workers on temporary visas. For its answer, Auburn asserts, inter alia, that she was not qualified for the positions for which she applied.

On August 9, 1993, Respondent filed a motion to dismiss, accompanied by a motion a for protective order.

The motion for summary decision contends that

(1) The complaint fails to state a claim on which relief may be granted. Respondent argues that 8 U.S.C. §1324b is inapplicable to a situation, as here, where the citizenship discrimination claim is that the employer prefers non-citizen hires.

(2) The complaint is procedurally defective because

(a) Respondent was not provided adequate, timely notice of the date, place and circumstances of the alleged discriminatory conduct as required by 8 U.S.C. §1324b(b)(1); and,

(b) the underlying OSC charge is time-barred by §1324b(d)(3), having been filed more than 180 days after the alleged discrimination occurred, i.e, rejection by Respondent of the charging party's employment application for a professional appointment in Respondent's mathematics departments.

Respondent sought the protective order in order to be relieved, until 30 days after issuance of a ruling on the motion to dismiss, from any obligation to respond to specified discovery requests served by OSC on July 29, 1993.

On August 16, 1993, without awaiting Complainant's reply, I issued an order granting the requested extension of time for Respondent's response to the outstanding discovery.

On August 18, 1993, I granted OSC's oral motion which recited that Respondent did not object, for an extension until September 7 for timely filing of an OSC response to the motion to dismiss.

On September 7, 1993, OSC filed its opposition to the motion to dismiss.

As to (1), I conclude that the complaint states a claim on which relief may be granted under 8 U.S.C. §1324b. The case file discloses that the charging party became a permanent resident alien on March 1, 1990

and retained that status at the time of the alleged discrimination and through the time when she signed her charge on October 20, 1992. The complaint, dated May 14, 1993, identifies her as a citizen of the United States. For purposes of the ruling on Auburn's motion, it is immaterial whether she was a citizen or a permanent resident alien at the time of the alleged discrimination; in either case she was a protected individual. As stated in the conference, having considered the filings of the parties, I denied so much of the motion as claims that §1324b fails to protect against discrimination where the employer prefers non-citizen hires. OCAHO precedent makes clear that §1324b reaches claims of discrimination as between noncitizens. As held in Nguyen v. ADT Engineering, 3 OCAHO 489 (2/18/93) at 6-7:

> IRCA was enacted to avoid workplace discrimination against people who, although appearing foreign or sounding foreign, are authorized to be employed in this country. Subject to exceptions not pertinent here, for those protected under IRCA, its command is universal.
>
> * * * *
>
> As a permanent resident, Nugent is a protected individual. §1324b(a)(3)(B). I hold that nothing in IRCA nor its legislative history suggests that Nugent's rights in a discrimination-free workplace are reduced because that workplace is populated with non-citizens authorized to be employed in the United States.

Respondent argues also that the complaint is defective for failure to allege that it had knowledge of the charging party's citizenship status. Respondent cites my decision in Martinez v. Lott Constructors, Inc., 2 OCAHO 323 (4/30/91) for the proposition that absent knowledge of the employee's citizenship status the employer cannot be held liable for discrimination on account of that citizenship. The answer, however, is that knowledge as an element of intent is a matter of proof, not pleading. I do not find the complaint wanting.

The same principle has been held to apply where the charging party is a citizen who claims to be disadvantaged in favor of noncitizens. Yefremov v. NYC Dep't. of Transportation, OCAHO Case No. 92B00096 (9/21/93) at 36. ("Although no such case has yet found liability, it is well-settled that a factual scenario may develop where an employer will be found to have discriminated against a U.S. citizen in favor of a non-citizen."). See also Hensel v. Oklahoma City Veterans Affairs Medical Ctr., 3 OCAHO 532 (6/25/93); U.S. v. General Dynamics, 3 OCAHO 528 (5/6/93) at 20, appeal docketed, No. 93-70581 (9th Cir. 1993); U.S. v. McDonnell Douglas Corp., 2 OCAHO 351 (7/2/91) at 9-10.

As to (2)(a), Auburn claims that I held a similar letter to be an "insufficient statutory notice in an unrelated prior proceeding." Motion at 14 n. 15. Respondent cites In re Investigation of Florida Rural Legal Services v. Immokalee Agricultural Workers, 3 OCAHO 428 (5/15/92). At the conference, I suggested that Immokalee dealt with the legal sufficiency of the subpoena and not at all with the adequacy of the underlying OSC notification letter to the employer. Auburn's counsel responded that the Immokalee order could be understood to support his claim when considered in light of the underlying notification letter. I disagree. The quotation from Immokalee in OSC's opposition to the motion to dismiss in the present case disposes of Auburn's contention:

In view of the result of this Order I do not reach the issue raised by Respondent of adequacy of the Notice of the Charge, 8 U.S.C. § 1324b(b)(1) . . .

Immokalee, 3 OCAHO 428 at 3.

I conclude that Respondent was provided with sufficient notice of the date, place and circumstances of the alleged discriminatory conduct in compliance with 8 U.S.C. §1324b(b)(1). The excerpts set out in the pleadings by the parties from OSC's November 2, 1992 letter to Auburn specify the date, place and circumstances of Auburn's alleged citizenship status discriminatory conduct. The letter provided Auburn with adequate notice of the charge it faced. See e.g., In re Investigation of Florida Rural Legal Services v. Immokalee Agricultural Workers, 3 OCAHO 437 (6/15/92).

I reject the suggestion that because the parties dispute the date, if at all, Balazs-Kilgore was rejected by Auburn, the adequacy of the notice is rendered suspect. Whether and when the job applicant was rejected, is a matter of proof, not an issue for summary disposition on these pleadings. I need not decide whether OSC could have provided more specificity in its notice letter. I do decide, however, that there is no basis for concluding that Respondent was mislead as to the gravamen of OSC's notice of an alleged unlawful citizenship status discrimination.

As to (2)(b), Respondent contends that the underlying OSC charge is t ime-barred by §1324b(d)(3), because Balazs-Kilgore was rejected by Auburn more than 180 days prior to October 26, 1992, the date she filed her charge with OSC. Respondent points to EEOC filings on April 7, 1992 and April 25, 1992. As the EEOC filings were said to have arisen out of the same facts as the present case, Respondent

argues that the charging party's own actions confirm that she had notice that her application was rejected more than 180 days prior to filing her charge. For response, OSC argues that the EEOC filings were anticipatory, and that she was never formally rejected:

> Finally, in September, 1992, Dr. Balazs-Kilgore reached the conclusion that it was inevitable that Respondent was not going to hire her and was committed to hiring the four foreign workers and that she was never going to receive a formal letter of rejection.

OSC Opposition at 7.

OSC contends, accordingly, that her charge was timely in context of "the time when it had become apparent to her that the foreign workers would be hired and she would not." Id. at 8.

OSC relies also on U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89), appeal dismissed, 951 F.2d 1186 (10th Cir. 1991), to the effect that the 180-day statutory time limit only begins to run when the discriminatory act becomes fully apparent to the aggrieved individual. At the conference, I raised the question whether the open and continuous hiring practice in Mesa is distinguishable from collegiate hiring based on cyclical, academic calendars.

As an alternative to the contention that the charging party did not reasonably know until September 1992, if ever, that she had been effectively rejected, OSC contends that the April 1992 EEOC filings tolled the 180-day limitations period. OSC relies on the Memorandum of Understanding (MOU) between OSC and EEOC, 54 Fed. Reg. 32499 (1989). By the MOU the two agencies "appoint each other to act as their respective agents for the sole purpose of allowing charging parties to file charges to satisfy the statutory time limits."

The parties are in disagreement as to the breadth of the MOU. Relying on Yefremov v. NYC Dep't. of Transportation, 3 OCAHO 466 (10/23/92), Lundy v. OOCL (USA) INC., 1 OCAHO 215 (8/8/90) and Ekunsumi v. Hyatt Regency Hotel of Cincinnati, 1 OCAHO 128 (2/1/90), OSC asserts that the MOU applies no matter what wrong is specified in the filing with EEOC. Auburn argues that filings with EEOC of age and sex discrimination claims, filings that do not implicate national origin or citizenship are insufficient to trigger the MOU. At the conference, OSC argued in effect that because Balazs-Kilgore informed EEOC that she was discriminated against to the benefit of a noncitizen, OSC jurisdiction is implicated, and the MOU applies. Auburn responded that, as in this case, absent a claim that appears cognizable to the other agency's jurisdiction, failure by

EEOC to refer the filing to OSC confirms that the MOU was not intended to be applicable. In this respect, I suggested that OSC's offer in response to obtain such a reference now would not be probative as to the scope of the MOU. I suggested also that the precedents which addressed the MOU in particular and equitable tolling in general may not control the facts in the present case.

In contrast to items (1) and (2)(a), the issue of timeliness was not resolved at the conference and will, instead, be the subject of discovery and briefing.

V. *The Procedural Schedule*

A. In the effort to resolve threshold questions at an early stage, the question of timeliness will be addressed by the parties by memoranda predicated on stipulated facts to the maximum feasible extent, augmented by discovery limited to that issue. In light of the subsisting stay of discovery, the parties will be expected to reach an understanding concerning which portions of the original discovery requests are material to the timeliness question.

B. The target date for filing concurrent memoranda on the timeliness issue is November 30, 1993.

C. Absent settlement or other action to conclude the case, a second telephonic prehearing conference will be held on December 10, 1993 at 10:00 a.m., as agreed.

SO ORDERED.

Dated and entered this 23rd day of September 1993.

MARVIN H. MORSE
Administrative Law Judge